The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff v. PAIGE A. THOMPSON, Defendant.	NO. CR19-159 RSL **UNITED STATES' REPLY IN SUPPORT OF ITS MOTION FOR EXAMINATION OF DEFENDANT UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 12.2(c) AND MOTION TO COMPEL** NOTING DATE: February 4, 2022

I. INTRODUCTION

In its response to the government's motion for an examination of Defendant Paige Thompson under Federal Rule of Criminal Procedure 12.2(c), counsel for Thompson has not denied that the government is entitled to such an examination. Instead, the defense argues that it filed its Rule 12.2(b) notice of intent to present expert evidence of a mental condition only after being "caught off guard" when it reviewed grand jury materials provided by the government, and that this somehow justifies limiting the government's ability to rebut Thompson's mental health defense. Dkt. No. 191 at 1–2. According to Thompson, despite the fact that she was indicted for wire fraud and other fraud offenses on August 28, 2019—and that the first and second superseding indictments each have included the same fraud counts—the defense was surprised to learn that the government indeed plans

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to prove at trial that Thompson possessed the requisite mens rea for the charges on which she has been indicted.

Contrary to the defense's arguments, the government has never conceded that Thompson's mental health prevented her from forming the specific intent to commit wire fraud and computer fraud, nor has it "pivoted" or taken inconsistent positions. *Id.* at 5, 13. Rather, the government addressed Thompson's mental health in the legally distinct context of whether any pre-trial release conditions would reasonably assure her appearance and the safety of any other person and the community. Thompson has now provided notice that she intends to introduce expert evidence of a mental condition bearing on her guilt—i.e., evidence that bears on her specific intent. The government is entitled to rebut Thompson's expert evidence on this point through "the only effective means of challenging that evidence: testimony from an expert who has also examined [her]." *Kansas v. Cheever*, 571 U.S. 87, 94 (2013). This Court should reject the limitations on the government's examination that Thompson seeks to impose.

II. ARGUMENT

A. Expert evidence of a mental condition bearing on Thompson's guilt is only relevant to her specific intent to defraud and the government has consistently alleged her intent.

In this circuit, diminished capacity "generally is only a defense when specific intent is at issue." *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988). Here, Thompson has been indicted for specific-intent crimes—a fact of which the defense has been aware since at least August of 2019 when Thompson was indicted. *See* Dkt. No. 33 (Indictment); *see also, e.g.*, *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013) (the elements of wire fraud include "a specific intent to defraud").

The first superseding indictment, filed in June 2021 (Dkt. No. 102)—well after Thompson's pre-trial detention proceedings were resolved in November 2019—again made clear she was facing charges for specific-intent crimes. The defense's claim that it was "understandably caught off guard by the government's seeming change of strategy" after it reviewed grand jury transcripts provided on November 23, 2021 (well in advance

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of any deadline to disclose such materials), is therefore hard to countenance. The defense has known for over two-and-a-half years that Thompson faces fraud charges, first brought in 2019, and that any diminished capacity defense she might choose to advance would be relevant only to the question of her specific intent. *See Twine*, 853 F.2d at 679.

The defense argues the government has changed its position because it presented evidence of Thompson's mental health issues during the pre-trial detention proceedings in 2019. The defense even goes so far as to suggest that perhaps the government should be judicially estopped from presenting evidence that Thompson had the intent to commit the crimes with which she is charged. *See* Dkt. No. 191 at 12. Thompson's arguments on this point lack merit.

The question at a pre-trial detention hearing upon a government motion under 18 U.S.C. § 3142(f)(2)(A) is "whether there are conditions of release that will reasonably assure the appearance of [a defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). The question is *not* whether the defendant had the requisite mental state at the time she committed the offenses with which she is charged. The government made no representations on this latter point during Thompson's pretrial detention proceedings, and nothing the government argued in support of its position that Thompson presented a danger and a risk of flight is inconsistent with proving she had the requisite mens rea to commit wire and computer fraud. Accordingly, this Court should reject the defense's suggestion that the government's examination of Thompson must be limited in some way to "remediat[e] any notion" that the government has gained an advantage by asserting inconsistent positions. *Cf. Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a *clearly inconsistent* position." (emphasis added)).

The government's position that it must be allowed to examine Thompson under Rule 12.2(c) to prepare to rebut her expert's evidence about her mental condition as it bears on intent—the only issue on which her expert's mental condition evidence would be

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relevant—is in no way a contradiction of its earlier position that Thompson should be detained before trial. Thompson has been on notice of the charges she faces since 2019 and her belated expressions of surprise regarding the government's plan to actually prove those charges, including that she specifically intended to commit them, should not be accepted by this Court.

B. The government's expert must be able fully to prepare to rebut Thompson's mental health defense should she decide to introduce such a defense at trial.

Thompson filed a notice of her intent to present expert evidence of a mental condition under Rule 12.2(b) on December 6, 2021. *See* Dkt. No. 26. Under Rule 12.2(c)(1)(B), this notice triggered the government's right to move for its own expert exam. The government agrees that it is entirely Thompson's choice at trial whether to put on expert evidence of her mental condition, and that if she chooses not to do so, then under both Rule 12.2(c)(4) and 12.2(e), neither the fact that she issued a notice of her intent to raise such a defense, nor "any statement made by [her] in the course of any examination conducted under [Rule 12.2] (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against" her. Fed. R. Crim. P. 12.2(c)(4).

However, just because Thompson may not ultimately decide to raise this defense at trial does not mean that the government should be limited in its ability to prepare to meet it in the event that she does. The very purpose of requiring notice under Rule 12.2(b) is to "alert[] the Government to a defendant's intention to introduce expert mental-health evidence, thereby giving the Government a chance to prepare its own mental-health evidence in rebuttal." *LeCroy v. United States*, 739 F.3d 1297, 1305 n.6 (11th Cir. 2014). The government should be given the opportunity to have its own expert conduct a full examination and, as further explained below, should not be limited in the ways Thompson proposes.

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1. The government's expert should be given access to the records reviewed by Thompson's expert, as well as his testing data and exam notes.

The government has asked this Court to order that Thompson provide to its expert, Dr. Kenneth Muscatel, the mental health records reviewed by her expert, Dr. Goldenberg, as well as his notes and testing data. *See* Dkt. No. 190 at 6. The declaration of Dr. Muscatel, filed as an exhibit to this reply, explains the importance of these records to his evaluation, and states that providing "both parties' experts access to the same healthcare records is standard practice in the field of forensic psychology." Muscatel Decl., ¶ 3. As Dr. Muscatel further explains, "Exchanging testing data, test results, and interview notes is [also] standard practice in forensic psychology." *Id.*, ¶ 4. And, as the government has explained, Thompson waived the privilege that might otherwise apply to these records by noticing her intent to put her mental state at issue at trial. *See* Dkt. No. 190 at 7 (citing numerous cases for this proposition).

Thompson argues that when she decides whether she will call any of the witnesses who wrote or reviewed her mental health records, she will provide those records to the government under Rule 16(b)(1)(B)(ii). *See* Dkt. No. 191 at 7. Thompson does not indicate when she intends to make this decision, although she seems to suggest that it will not be until the government presents its case-in-chief at trial. *See id.* at 5. But this ignores the government's need to *prepare* to rebut her expert's testimony about her mental health condition, should she choose to present it. The government's expert has indicated that in performing his independent psychological evaluation, it is standard practice to review the same records the defense's expert has reviewed, as well as the defense expert's raw testing data and exam notes. Thompson should not be permitted to sandbag and prevent the government's expert from conducting a full examination ahead of trial, thus leaving the government unable to fully rebut her expert's evidence should she decide to present it to the jury.[1]

[1] Additionally, Thompson's argument on this point is internally inconsistent. She asserts later in her response that the Court should limit Dr. Muscatel's "examination to the diagnosis and testing conducted by Dr.

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Thompson also argues that her right to the effective assistance of counsel under the Sixth Amendment would be compromised if she were required to disclose materials she provided to her expert. *Id*. at 8. But the case she cites for this proposition, *United States v. Sampson*, is a capital case discussing the "special considerations present when a capital defendant intends to use his mental condition *at the sentencing phase only*." 335 F. Supp. 2d 166, 243 (D. Mass. 2004). Here, evidence of Thompson's mental condition is only relevant to the question of guilt—that is, her specific intent to defraud. *See Twine*, 853 F.2d at 679. And she has already noticed her intent to present expert evidence of a mental condition bearing on her guilt under Rule 12.2(b) and identified her expert witness. Giving Dr. Muscatel the same materials Dr. Goldenberg reviewed therefore does not require Thompson "to reveal [her] strategy." *Sampson*, 335 F. Supp. 2d at 243. Her strategy is already clear—she may decide to present expert evidence at trial bearing on her mens rea. In turn, the government should be given a chance fully to prepare to rebut this evidence in the event that she does. And, as Dr. Muscatel has explained, full preparation includes reviewing the same materials available to Thompson's expert. The Court should grant the government's motion to compel production of these materials to its expert.

2. The government expert's examination should not be limited as Thompson proposes.

Thompson asks the Court to "limit the government's examination to the diagnosis and testing conducted by Dr. Goldenberg." Dkt. No. 191 at 9. The Court should reject this request.

First, as Dr. Muscatel explains in his declaration, the tests Dr. Goldenberg administered do not include "most of the tests that [Dr. Muscatel] consider[s] most important to evaluating" Thompson. Muscatel Decl., ¶ 5. Dr. Muscatel will decide to administer tests "based on clinical indications at the time of the examination itself," and notes that "[a]llowing a licensed practitioner to administer the psychological tests that he

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Goldenberg." Dkt. 191 at 9. But it is difficult to understand how Dr. Muscatel could truly conduct an examination that matches Dr. Goldenberg's without reviewing the same records Dr. Goldenberg reviewed, the test results he obtained, and the notes regarding his interview with Thompson.

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or she deems relevant to forming an opinion is standard practice in forensic psychology." *Id.*, ¶¶ 5, 7. Additionally, Dr. Muscatel notes that all of Dr. Goldenberg's tests "are based on self-reporting," and none of the tests "has a validity scale." *Id.*, ¶ 6. As a result, "the testing battery administered by Dr. Goldenberg lacks effective controls to detect possible minimization or exaggeration of symptoms." *Id.* In order for Dr. Muscatel properly to evaluate Thompson, he must be permitted to administer tests with validity scales. *Id.* And Dr. Muscatel's declaration lists the tests he may wish to perform during his examination, allaying the defense's concern that it is "impossible for counsel to understand just what an intended examination would involve." Dkt. No. 191 at 9.

Notably, a district court in this circuit recently approved examination procedures before the trial of Elizabeth Holmes very similar to those the government requests here. *See United States v. Holmes*, 2020 WL 5414786, at *5 (N.D. Cal. Sept. 9, 2020). The court ordered that the government's experts be "permitted to administer any tests and ask any questions they deem necessary to form an expert opinion" on the topics Holmes listed in her Rule 12.2(b) notice. *Id.* Here, of course, Thompson chose not to explain in her Rule 12.2(b) notice what topics her expert intends to cover. Presumably, her expert, if he testifies, will present evidence about her mental state at the time of the charges on which she is indicted, as that is the only subject on which Dr. Goldenberg's testimony is arguably relevant. Accordingly, the Court should permit Dr. Muscatel to administer any tests and ask any questions he deems necessary to form an expert opinion on Thompson's mental state as relevant to her intent at the time of the charged offenses.

Dr. Muscatel himself explains that the "central question in developing and providing relevant expert testimony concerning a defendant's mental health is what the person's mental state was at the time of the alleged offenses." Muscatel Decl., ¶ 8. As a result, Dr. Muscatel notes that it will be necessary for him to ask, and for Thompson to answer, "questions about her mental status around the timeframe of the offense, and about the offense itself." *Id.* And of course, if Thompson refuses to answer such questions, "she will interfere with [Dr. Muscatel's] ability to provide relevant testimony." *Id.* If this transpires,

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this Court may then decide whether expert testimony Thompson herself wishes to introduce on the issue of her mental condition should be excluded under Rule 12.2(d)(1)(B). *See United States v. Telles*, 18 F.4th 290, 231 (9th Cir. 2021). But that is a decision to be made if Thompson in fact refuses to answer questions, and not a reason to limit the scope of Dr. Muscatel's examination before trial.

In sum, Dr. Muscatel's examination should not be limited to the tests and topics the defense's expert has chosen. Such an approach would limit Dr. Muscatel's "access to the 'basic tool' of his . . . area of expertise: an *independent* review with and examination of the defendant." *United States v. Haworth*, 942 F. Supp. 1406, 1408 (D.N.M. 1996) (emphasis added). It would also "undermine the adversarial process," allowing Thompson to provide the jury "through an expert operating as proxy, with a one-sided and potentially inaccurate view of [her] mental state at the time of the alleged crime." *Cheever*, 571 U.S. at 94. In the event Thompson opts to present a mental health defense, the government should be permitted to rebut with the results of an independent examination wherein Dr. Muscatel has formed his own conclusions based on his own expertise.

3. Thompson may have an attorney present during the interview portion of the government expert's examination but not during test administration.

After conferring with Dr. Muscatel regarding his examination requirements while preparing this reply, the government learned—contrary to what it had initially understood—that Dr. Muscatel does not object to an attorney for Thompson being present during the interview portion of the examination. *See* Muscatel Decl., ¶ 9. Accordingly, the government agrees that Thompson may be accompanied by an attorney during her interview.

However, Dr. Muscatel has reiterated that no defense representative or any other third party can be present for the testing portion of the examination. *Id.* The government had originally believed that Dr. Muscatel would employ a third party to administer the tests, but Dr. Muscatel has since clarified that, because the tests are psychological rather than neuropsychological, he will administer them. *Id.* And, in fact, because these

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psychological tests are designed to be taken alone and are validated only for that situation, neither Dr. Muscatel nor anyone else will be physically present in the room while Thompson takes the tests. *Id.*

4. The Court should reject Thompson's request to require a government "taint" attorney.

Thompson has not cited to a single case where a government "taint" attorney was used in a non-capital case under Rule 12.2, and the government is aware of none. Thompson's request is unduly burdensome and wholly unnecessary, and the Court should deny it.

Both of the cases Thompson cites in support of her request are capital cases, where the rule requires that the results of any examination "must not be disclosed to any attorney for the government *or* the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition." Fed. R. Crim. P. 12.2(c)(2) (emphasis added). That rule, by its own terms, does not apply in non-capital cases, and Thompson's cases are simply inapposite.

In *United States v. Sampson*, already discussed above, the court explained the logic underlying the procedure outlined in Rule 12.2(c)(2): the procedure, "while not constitutionally required, is designed to avoid litigation over whether the government has improperly made derivative use of the evidence" in order to prove guilt. 335 F. Supp. 2d at 243. But capital cases present "special considerations" because they involve the use of mental-condition evidence as mitigation at the *sentencing phase*. *Id.* The derivative-use concern in a capital case is that the government not "use the results of a defendant's mental examination, or any information derived from it, for a purpose other than rebuttal at sentencing." *Id.* Here, by contrast (and as explained above) Thompson's expert evidence of a mental condition is only relevant to her guilt (i.e., her intent). That is the only issue at trial on which Thompson is permitted to introduce such evidence, and, if she does, the only issue on which the government may offer its own expert mental health evidence in rebuttal. Thus, the derivative use concern present in capital cases does not exist here: there is no

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separate sentencing phase where mental health expert evidence will be presented to the jury as mitigation, and thus no risk that the government could or would use expert evidence developed as part of a mitigation case to prove guilt. Accordingly, no "taint" team is necessary.

United States v. Johnson, 362 F. Supp. 2d 1043 (N.D. Iowa 2005), also cited by Thompson, does not change this conclusion. Also a capital case, *Johnson* similarly discusses expert evidence of a mental health condition to be used at the sentencing phase of a trial and the requirements of Rule 12.2(c)(2)(1). *Id.* at 1082. The circumstances present in that case simply are not present here.

Finally, as the government has already explained, the government has not taken "clearly inconsistent" positions about Thompson's mental health. The question of whether Thompson's mental condition at the time of the charged offenses impacted her ability to form the necessary intent is different from the question of whether Thompson's mental health condition contributed to the need for pre-trial detention under the factors articulated in 18 U.S.C. § 3142(g). As to the former, the government has consistently taken the position that it can prove each of the offenses for which the grand jury has returned a true bill, including the requisite mens rea element for each of those offenses. Thus, there is no reason a "taint" team should be ordered; there is nothing to "remedite[]" with respect to the government's position regarding Thompson's mental health.

III. CONCLUSION

For the reasons set forth in this reply and in the United States' motion for examination of the defendant under Federal Rule of Criminal Procedure 12.2(c) and motion to compel, the government requests the Court issue an order directing Thompson to (1) produce to Dr. Muscatel no later than February 9, 2022, (a) all health care records, and any other records provided to Dr. Goldenberg, and (b) all testing data, test results, notes, and reports produced during Dr. Goldenberg's examination of Thompson; and (2) submit no later than February 28, 2022, to a government examination to be led by Dr. Muscatel, under the conditions outlined in the government's motion, except that Thompson may have an

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attorney present with her during the interview portion of Dr. Muscatel's examination and Dr. Muscatel, rather than a third party, will administer the psychological tests during the exam.

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Respectfully submitted,

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